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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 607

HENRY E. JACOBS, doing business as
HENRY E. JACOBS & CO.,
Petitioner,

vs.

CHARLES PECKAT MANUFACTURING COMPANY
and EMMA PECKAT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, and

BRIEF IN SUPPORT.

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INDEX

	PAGE
Petition for Writ of Certiorari	1
Jurisdiction	3
Summary and statement of matters involved	3
The litigation and parties	3
The patent in suit	4
Principal holdings of the trial and appeal courts	7
Questions presented	10
Reasons relied on for allowance of the Writ	13
1. Important questions of patent law have been decided in a manner in conflict with and overriding the decisions of this Court and in conflict with the decisions of other circuits	13
2. Important questions not heretofore settled by decisions of this Court are raised	16
3. The court below has departed from the accepted course of judicial proceedings	16
4. The decision adversely affects an important industry	18
Conclusion	19
Brief in support of Petition for Writ of Certiorari	21
Opinions below	22
Jurisdiction	22
Statement of facts	22
Specification of errors to be urged	23

ARGUMENT

1. Important questions of Patent Law have been decided contrary to and overriding this Court's decisions and those of other circuits	26

PAGE

a. The Court of Appeals read limitations derived from the specification into claims too clear, certain, and unambiguous to enable such practice, and too broad otherwise to be valid 26

b. The Court of Appeals defined the "crucial" element as the wedging construction, but held valid claims which in absolutely no manner described a wedging construction, contrary to R. S. 4888 and Halliburton v. Walker (329 U. S. 1) 28

c. The Court of Appeals depended strongly upon presumptions to find validity and invention 31

2. Important questions not heretofore settled by decisions of this Court have been raised 32

a. This Court has never passed upon whether a "freak" patent is entitled to the presumption of validity which attaches by issuance 32

b. This Court has never to the best of the writer's knowledge passed on whether the presumption of validity occasioned by issue overcomes a finding of a trial court of non-compliance with R. S. 4893 32

3. The court has departed from the accepted course of judicial proceedings 33

a. The Court of Appeals applied a reversed decision of its own to override the District Court, contrary to the ruling of this Court 33

b. The Court of Appeals did not render a judgment upon the main issue involved, but raised an unimportant side-issue which might have justified a reversal, tacitly recognizing that the only judgment which it could have rendered upon the true issue would have required affirmance 34

c. Practically all evidence proved that claims reading only upon clamping brackets were invalid, but the Court of Appeals found the evidence insufficient when applied to the inconsequential

PAGE

issue upon which the court erroneously based its decision, and should not have reversed the District Court's findings based upon this evidence 36

4. The decision adversely affects an important industry 37

It appears to limit the claims, but actually ratifies the respondents' position that the claims are to be interpreted broadly thereby placing a weapon in the hands of respondents..... 39

5. Conclusion 39

APPENDIX

News articles in national trade papers..... 41

Table of Authorities

Cases

Frank Adam Electric Co. v. Colt's Patent Firearms Mfg. Co., 148 F. (2d) 497, 502-3.....15, 31

Aluminum Co. v. Thompson Prod., Inc., 122 F. (2d) 796 13

Altoona Theatres v. Tri-Ergon Corp., 294 U. S. 477, 487, 79 L. Ed. 1005..... 13

American Soda Fountain Co. v. Sample, 130 F. 145, 149; c. d. 195 U. S. 634..... 15

Consolidated Motor Parts v. Nat. Motor Bearing, 80 F. (2d) 97, 93..... 13

Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 422; 52 L. Ed. 1122..... 9

Electric Vacuum Cleaner Co. v. P. A. Greier Co., 118 F. (2d) 221, 225..... 15

Farmers Cooperative v. Turnbow, 111 F. (2d) 728, 732; c. d. 311 U. S. 681..... 14

Faulkner v. Gibbs (U. S. Sup. Ct.), 83 U.S.P.Q. 192..... 31

Gebhard, et al. v. General Motors Sales Corp., et al., 135 F. (2d) 248, 249..... 15

PAGE

General Electric Co. v. Wabash Co., 304 U. S. 364, 373; 82 L. Ed. 402 13

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U. S. 271; 93 L. Ed. 492 .....8, 13, 16, 18, 24, 33, 34, 37

Halliburton v. Walker, 329 U. S. 1; 91 L. Ed. 3 ....2, 8, 10, 14, 21, 23, 28, 31

Hall Laboratories, Inc. v. Economics Laboratory, Inc., 169 F. (2d) 65, 68 14

Hawkinson Co. v. Dennis, 166 F. (2d) 61, 62 16

Himmel Bros. v. Serrick Corp., 122 F. (2d) 740 15

Johnson Laboratories, Inc. v. Meissner Mfg. Co., 98 F. (2d) 937, 943 15

Koebel v. Coe, 105 F. (2d) 784, 785 14

Lempco Products Co. v. Timken-Detroit Axle Co. CCA 6, 110 F. (2d) 307, 310; c. d. 311 U. S. 675 15

Linde Air Products Co. v. Graver Tank & Mfg. Co., 167 F. (2d) 531, 536 .....8, 16, 24, 33, 34

McCarty v. Lehigh Valley Railroad Co., 160 U. S. 110; 40 L. Ed. 358 28

Metallic Extraction Co. v. Brown, 110 F. 665, 668 15

Paramount Corp. v. Tri-Ergon Corp., 294 U. S. 464, 476; 79 L. Ed. 997 16

Pyrene Mfg. Co. v. Urquart, 175 F. (2d) 408, 411; c. d. 70 S. Ct. 73 15

Refrigeration Patents Corp. v. Stewart-Warner Corp., 157 F. (2d) 972; c. d. 331 U. S. 834 14

Rice v. Nash-Kelvinator Corp., 150 F. (2d) 457 14

Rid-Jid Products Co. v. Rich Pump & Ladder Co., 103 F. (2d) 574 15

Schick Dry Shaver, Inc. v. Dictograph Prod. Co., 89 F. (2d) 643 13

Schnitzer v. Cal. Corrugated Culvert Co., 140 F. (2d) 275 14

Stoody Co. v. Mills Alloys, 67 F. (2d) 807, 810 15

Toledo Pressed Steel Co. v. Standard Parts, Inc., 307 U. S. 350, 357; 83 L. Ed. 1334 15

PAGE

United States Gypsum Co. v. Consolidated Expanded Metal Companies, 130 F. (2d) 888, 890; c. d. 317 U. S. 698 15

Wayne et al. v. Humble Oil Refining Co., 175 F. (2d) 230, 234 13

STATUTES AND COURT RULES

28 U. S. C. A. 1254.....3, 22

R. S. 4888 (35 U. S. C. A. 33)....2, 7, 10, 19, 21, 23, 25, 28, 32

R. S. 4893 (35 U. S. C. A. 36).....16, 24, 32

Rule 52(a) FRCP 18

Rule 38(5-b) Supreme Court..... 3

TEXTS

30 Corpus Juris Secundum 506..... 36

Manual of Patent Office Procedure, U. S. Pat. Off., 706.03(h) (1949) 19

LAW REVIEW ARTICLE

"Proposed Modifications in the Patent System," Vol. XII (1947), Law and Contemporary Problems (Duke Univ.) No. 4, p. 801.....32-33

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No. .....

HENRY E. JACOBS, doing business as
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CHARLES PECKAT MANUFACTURING COMPANY
and EMMA PECKAT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review a judgment entered by said court on December 12, 1949 in:

Cause No. 9846 on the docket of said court wherein the petitioner was the appellee.

The judgment held valid claims 1, 2, 6, and 7 (being all the claims in suit) of U. S. Letters Patent 2,180,909 issued Nov. 21, 1939 to Charles Peckat for AWNING FOR AUTOMOBILES. Infringement was admitted, if the claims were valid.

The judgment was entered upon appeal taken by respondents from the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division. The action was brought by the respondents Emma Peckat and Charles Peckat Manufacturing Company, both of Maywood, Illinois, the patent owner and exclusive licensee, respectively, against petitioner Henry E. Jacobs of Chicago, Illinois, charging infringement of the Peckat patent.

The District Court did not file a formal opinion, but received proposed findings of fact and conclusions of law from the litigants and adopted those included in the record (R. 147). The opinion of the Court of Appeals appears in the record (R. 272) and is reported at ..... Fed. (2d) ....., 84 U. S. P. Q. 4.

The respondents urged that the Peckat claims covered as the gist of the invention the broad concept of a visor attached to the gutters of an automobile by brackets, each independently clamped to the respective gutter (respondents' proposed findings 13, 14, 18 (R. 160-161)). The trial court found that this broad construction was anticipated by the prior art and that the claims so included the prior art that they were invalid (R. 153).

The court further found that Peckat described a clamp having a wedging construction (Finding 9, R. 148) but that the claims were invalid because they did not state the structure by which the wedging action is made possible in contravention of R. S. 4888 (35 U. S. C. A. 33); that they were so broad as to claim a result and thereby came within the doctrine of *Halliburton* v. *Walker*, 329 U. S. 1.

The Court of Appeals reversed the District Court and held all the claims valid. It treated the issue of the case

as being whether the wedging arrangement[1] constituted invention, and its opinion is based upon this side issue.

JURISDICTION.

This Court has jurisdiction to review the judgment under Section 1254 (1) of the Judicial Code (28 U. S. C. A. 1254) and Rule 38 (5-b) of the Rules of the Supreme Court of the United States.

The judgment to be reviewed was entered Dec. 12, 1949 (R-286).

SUMMARY AND STATEMENT OF MATTER INVOLVED.

The litigation and parties.

Respondents filed suit against Jacobs, a small automobile accessories dealer; the R. S. B. Manufacturing Co. of Los Angeles, California, who had manufactured and sold the accused device to Jacobs, took control of and financed the defense.

R. S. B. was a former licensee under the Peckat patent, and admitted making and selling the accused device, that same infringed the claims if they were valid, but denied that the extremely broad claims in suit were valid in view of a considerable amount of prior art, including prior use, sale, invention, and knowledge. Defendant's evidence consisted of depositions supported by actual models (see, for example, R. 121-4 offered R. 75), the prior patents, publications, catalogues, and the usual, all of which ostensibly was rejected by the Court of Appeals, but which was tacitly respected by the actual decision, since the court read limitations into the claims in order to save them from this prior

[1] As a minor part of the case, the District Court found that the wedging construction was mere mechanical skill (Findings 19, 25 and 26, R. 151, 152).

art and evidence it had found wanting. The Court of Appeals thereby established that the necessity of having *any* words of limitation in patent claims no longer exists.

The patent in suit.

Peckat patent No. 2,180,909 relates to an automobile visor adapted to be secured on the outside of a vehicle for shading the windshield. The visor art was found by the Court of Appeals to be old, *(see Scott, 2,207,227, R. 265 offered R. 64 and Mueller 1,424,421, R. 203 offered R. 107 as good examples)*, but no art was cited against the application while it was pending in the patent office. Actually, the patent is a "freak".[2]

The construction shown in the Peckat patent (and used with certain modifications (R. 100-103) in the bracket sold by the respondent corporation at the time of trial) is characterized by a wedging member cooperating with a clamp to enable independent attachment of a bracket to each of the gutters alongside of the windshield of an automobile. (See diagram on page opposite). There is a wedge shaped

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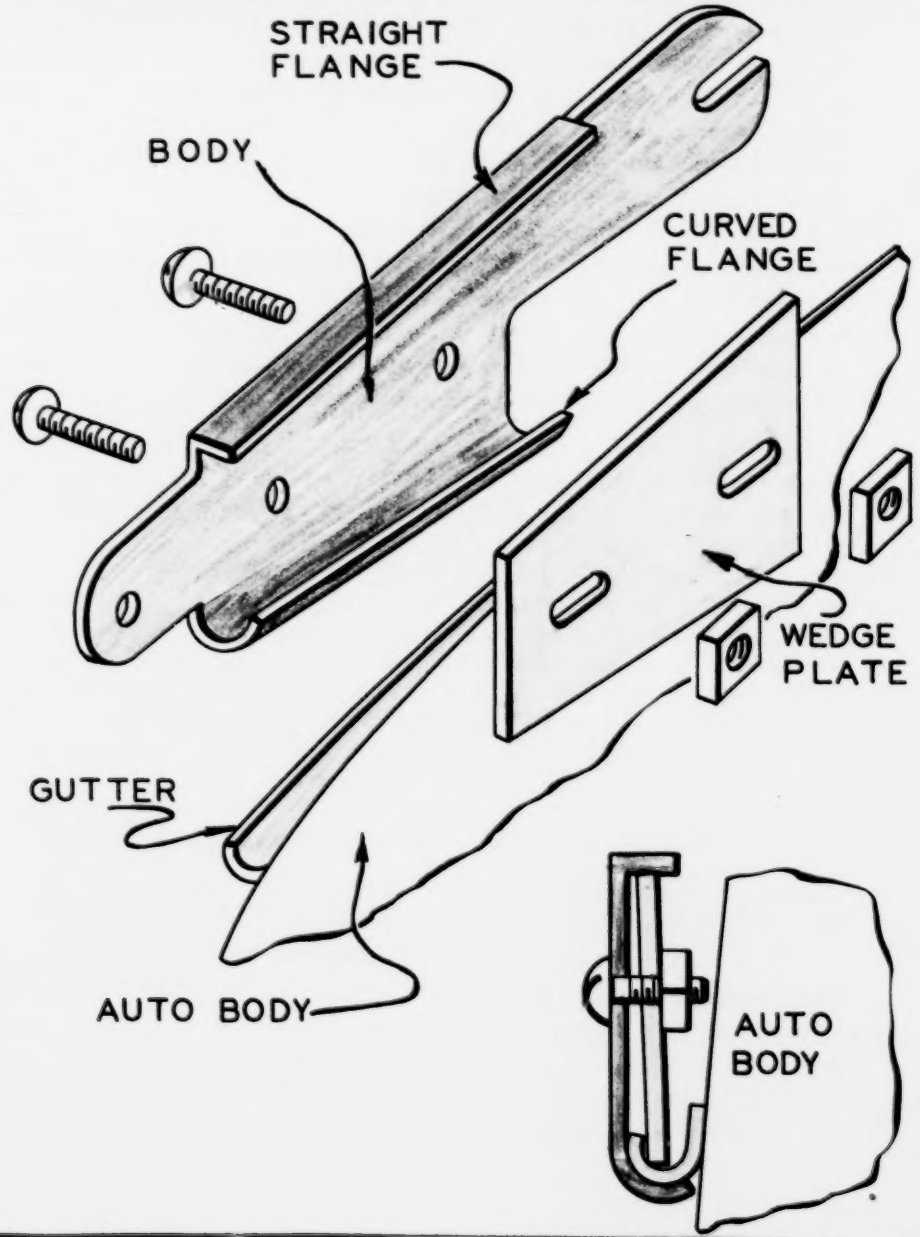
[2] The Peckat patent was filed June 29, 1939, allowed Sept. 28, 1939 (R. 126 and ff.) less than three months thereafter. It was issued Nov. 21, 1949, the total elapsed time from filing to issue being four months and three weeks. The application, with eight claims, was allowed and issued precisely as filed, with no patent office action or correspondence (other than the printed form of allowance), and no references cited.

The Peckat patent is officially classed in class 296-95 in the patent office (R. 127). As of January 24, 1950, that class and sub-class listed a total of 66 patents issued in the entire history of the patent office. In addition, 36 patents were listed as cross-references. Petitioner's searches located 19 patents (most of which were found to anticipate Peckat by the trial court) in other classes and sub-classes. All in all, there are a total of 121 patents on the same or similar subject matter covering thirty years. **In the history of this group of patents, the time from filing to issue of the Peckat patent is less than that for any other patent.**

THE PECKAT CONSTRUCTION AS DESCRIBED IN THE SPECIFICATION



body (red) which has a flange (green) along its upper edge and one (blue) along its lower edge, the flange on the lower edge being curved so that it may hook onto the bottom of an automobile gutter (orange). A wedge-shaped plate (yellow) is adapted to be mounted upon the inside of the body. In installation, the curved flange is hooked under the gutter, and the wedge plate is laid onto the body with its lower edge in the crook of the gutter and its upper edge under the straight flange. The bolts are passed through the wedge plate and body and then tightened, which pinches the gutter between the body and the lower edge of the wedge plate thereby clamping the bracket to the gutter. Thereafter the wedge is struck by a hammer at its wide end to cause same to wedge between the inner crook of the gutter and the straight flange to tighten the bracket to the gutter.

A typical claim, claim 1, of the Peckat patent states:

> APPARATUS OF THE CHARACTER DESCRIBED FOR SUPPORTING AN AWNING IN THE DESIRED POSITION WITH RESPECT TO THE WINDSHIELD OF AN AUTOMOBILE HAVING GUTTERS ADJACENT SAID WINDSHIELD, INCLUDING: A PAIR OF MEMBERS ADAPTED TO BE CLAMPED TO THE GUTTERS ON EACH SIDE OF THE WINDSHIELD; AND MEANS CARRIED BY THE MEMBERS FOR SUPPORTING THE AWNING IN SAID POSITION.

Principal holdings of the trial and appeal courts.

The District Court held that clamping brackets to gutters did not constitute invention over the art, and that the claims were invalid.

The District Court further held that the claims violated R. S. 4888 (35 U. S. C. A. 33) because they did not describe the clamping members with particularity; that they did not state the structure by which the wedging action was made possible and thereby claimed more than the

patent showed to be novel if there were novelty; that the effect was to bring the claims within the doctrine of *Halliburton* v. *Walker,* 329 U. S. 1.

The Court of Appeals, in reversing the decision and holding the claims valid, found that, although the claims in language admittedly cover a field broader than the described structure (thereby paying tribute to the prior art it found insufficient, and which the patent office did not find at all), nevertheless are limited to the specific device and that each claim refers to and incorporates the specific description which includes the "crucial element", the wedge structure.

As authority for its reasoning the Court of Appeals cited and quoted from its own decision which held valid certain claims in *Linde Air Products Co.* v. *Graver Tank & Mfg. Co.,* 167 F. (2d) 531, 536 (R. 279). That decision has *been reversed by this Court on the specific point quoted by the Court of Appeals*[3] in *Graver Tank & Mfg. Co., et al.* v. *Linde Air Products Co.,* 336 U. S. 271. This Court held the identical claims invalid. The Court of Appeals apparently ignored the reversal in following reasoning discarded by the Supreme Court.

The Court of Appeals distinguished the case over *Halliburton* v. *Walker,* 329 U. S. 1, by observing that the *Halliburton* case did not outlaw the use of the word "means" and by further commenting (R. 278)

> "It should be observed, however, that in that case, the mode of operation of the accused machine was quite different from that described in the patent."

Petitioner was thus disqualified from having the law established in the *Halliburton* case applied to it because the

[3] All emphasis furnished.

accused device here was *admitted* to be an infringement and to operate on the same principles as the patented structure of Peckat.

The Court of Appeals found that this case was governed by *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, since the Peckat claims "structurally described the physical and operating relationship of all the crucial parts of the novel combination." The crucial part was found by the court to be the "wedge", but neither the word, nor its equivalent is found in any of claims 1, 2 or 6. Claims 1 and 2 do not even refer to the wedge by the word "means."

The Court of Appeals principally based its finding of validity on two presumptions. It found that issuance is a strong presumption, ignoring the following facts:

1. Not a single item of prior art was cited by the patent office, in the face of the extremely pertinent art introduced in evidence by petitioner.
2. The patent is a "freak".
3. The application had no prosecution in the patent office which would show any administrative decisions made upon disputed issues.
4. The District Court found enough evidence to warrant a conclusion that the application had not properly been examined.

The second presumption emphasized by the Court of Appeals to find validity was that the R. S. B. Co. imitated the Peckat structure. This, coupled with the fact that R. S. B. was a former licensee, the Court found to be almost "conclusive" evidence. The Court's decision has the effect of establishing doctrine, at least in the Seventh Circuit, that a former licensee, or one who defies a patent he

thinks flagrantly invalid, is practically estopped from denying the validity of that patent if he copies the patented structure, and further, that his very act of so copying helps ESTABLISH THE VALIDITY OF THAT PATENT.

QUESTIONS PRESENTED.

1. Whether Claims 1, 2, 6 and 7 of patent 2,180,909 are valid.
2. Whether claims which admittedly read broad enough to encompass the prior art can be saved from certain invalidity by limiting them to the precise structure described in the patent specification.
3. Whether a claim whose sole novelty purportedly rests in a wedging construction sufficiently describes the wedging construction by the phrase: "A PAIR OF MEMBERS ADAPTED TO BE CLAMPED TO THE GUTTERS"; or by the phrase: "APPARATUS OF THE CHARACTER DESCRIBED"; or by both phrases.
4. Whether claims 1, 2, 6 and 7 are invalid because they violate R. S. 4888 under the doctrine of *Halliburton* v. *Walker* in that there is a complete absence of any language relating to the "crucial" element in claims 1, 2, and 6, and the "crucial" element is functionally described in claim 7.
5. Whether a Court of Appeals may substitute for the extremely broad concept of the patentee as to the gist of the invention a totally new and greatly limited concept never considered in the issue, because said new concept might justify a finding of invention, whereas a finding that the broad concept of the patentee is invention, would be untenable.

6. Whether a Court of Appeals may disregard a reversal by the Supreme Court of a particular point of law in one of its prior decisions and use that point, and cite its own case as its authority to reverse a finding of the trial court in this case which followed the Supreme Court's reversing decision on the same point of law.
7. Whether a "freak" patent issued in a phenomenally short time, with no patent office history whatsoever and with absolutely no prior art cited by the patent office against it is entitled to the presumption of validity accorded issued patents, in the face of:
   a. Much anticipatory prior art introduced by the petitioner, the majority of which is not classified in the same class as the Peckat patent.
   b. The finding of the District Court that the evidence showed improper examination of the application.
8. Whether the burden of proof required of a former licensee in denying the validity of a patent is well-nigh insurmountable.
9. Whether the prior use testimony supported by actual models, depositions, agreed testimony, and documents is so clearly erroneous as to justify upsetting the findings of the trial court.
10. Whether a Court of Appeals can grant a patentee a broad prior-art-encompassing monopoly measured by clear, simple, and unambiguous language in the claims of a patent, by deliberately writing prior-art-avoiding limitations into the claims to save them from certain invalidity, where:
    a. The court admits the breadth of the language of the claims is prior-art-encompassing.

b. The patentee consistently asserts right to the broad interpretation of the claims.

c. The claims have no word or words justifying the limitations.

d. The issue of the case was the validity of the claims broadly interpreted.

e. Great confusion has been engendered in an important industry.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

The reasons relied on for the issuance of the writ prayed for are:

1. Important questions of patent law have been decided in a manner in conflict with the decisions of this Court, and in conflict with the decisions of other circuits.

   a. The court below in its zeal to find the Peckat patent valid, scrapped the principal issues between the parties: are the clear, unambiguous claims valid? and substituted a pseudo-issue: is the wedging construction valid? and then proceeded to read into the claims limitations from the specification to sustain the claims. It applied the rule of liberal interpretation reserved for those claims which require construction of their uncertain language to the Peckat claims which do not have any ambiguity, obscurity or uncertainty. The uniform decisions of this Court and the other circuits, and even in the Seventh Circuit up to the time of this decision have held that this practice is not applicable where the inventor sought a broader monopoly than was justified by his invention as he described it. *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Company,* (1949) 336 U. S. 271, 277; *General Electric Co.* v. *Wabash Co.,* 304 U. S. 364, 373; *Altoona Theatres* v. *Tri-Ergon Corp.,* 294 U. S. 477, 487; *CCA-2, Consolidated Motor Parts* v. *Nat. Motor Bearing,* 80 F. (2d) 97, 98 (1938); *CCA-5, Wayne et al.* v. *Humble Oil Refining Co.,* 175 F. (2d) 230, 234 (1949); *CCA-6, Aluminum Co.* v. *Thompson Prod. Inc.,* 122 F. (2d) 796 (1941); *CCA-7, Schick Dry Shaver, Inc.* v. *Dictograph Prod.*

Co., 89 F. (2d) 643, (1937); *CCA-8, Metallic Extraction Co.* v. *Brown*, 110 F. 665, 668; *CCA-9, Schnitzer* v. *Cal. Corrugated Calvert Co.*, 140 F. (2d) 275 (1944).

b. The court below repeatedly emphasized the fact that the "crucial" element of the combination was the "wedging" construction, and yet found the claims valid, although there were no words in any of the claims, except claim 7 that described, related to, or even hinted at this "wedging" construction. And as to claim 7, it referred to the "wedging" construction by stating that certain means were "so constructed and arranged as to be driven into wedging engagement". The court thus held valid claims which came clearly within the doctrine of *Halliburton* v. *Walker*, 329 U. S. 1, which is now followed in all circuits: App. D. C., *Koebel* v. *Coe*, 105 F. (2d) 784 (1939); *CCA-6, Rice* v. *Nash-Kelvinator Corp.*, 150 F. (2d) 457 (1945); *CCA-8, Hall Laboratories, Inc.* v. *Economics Laboratory, Inc.*, 169 F. (2d) 65; *CCA-9 Farmers Cooperative* v. *Turnbow*, 111 F. (2d) 728 (1940), and even by this circuit until the advent of this decision. *Refrigeration Patents Corp.* v. *Stewart-Warner Corporation*, 157 F. (2d) 972; c. d. 331 U. S. 834.

c. The court below based its decision principally upon two presumptions, the one referring to validity because of issuance, and the other, inferred to be almost conclusive, referring to presumption of validity and invention because the petitioner was a former licensee and manufactured the same product. As to the presumption occasioned by issue, this case is not qualified for such salutary advantages. In no case relied upon by the court was the patent in suit

obtained without battle in the patent office and without the patent office citing the principal references. The decisions which do apply state that the presumption is dissolved under circumstances where none of the important evidence was before the patent office. App. D. C., *Gebhard* v. *General Motors Sales Corp.* (1943), 135 F. (2d) 248; *CCA-3, American Soda Fountain Co.* v. *Sample,* 130 F. 145, 149; *Pyrene Mfg. Co.* v. *Urquart,* 175 F. (2d) 408, 411; *CCA-9, Stoody Co.* v. *Mills Alloys,* 67 F. (2d) 807, 810; *CCA-7, Johnson Laboratories, Inc.* v. *Meissner Mfg. Co.,* 98 F. (2d) 937; *Himmel Bros.* v. *Serrick Corp.,* 122 F. (2d) 740 (1941); *CCA-6, Lempco Products, Inc.* v. *Timken Detroit Axle Co.,* 110 F. (2d) 307 (1940); *CCA-8, Frank Adam Electric Co.* v. *Colt's Patent Firearms Mfg. Co.,* 148 F. (2d) 497 (1945).

The Court of Appeals placed much weight on the scale of invention by reason of R. S. B. having been a former licensee and having imitated the Peckat structure. To hold that invention is thereby established is like the tail wagging the dog. *Toledo Pressed Steel Co.* v. *Standard Parts, Inc.,* 307 U. S. 350, 357; *Rid-Jid Products Co.* v. *Rich Pump & Ladder Co.,* 6 Cir., 103 F. (2d) 574; *Electric Vacuum Cleaner Co.* v. *P. A. Greier Co.,* 118 F. (2d) 221, 225. This Court should once and for all settle the question of whether progress in any art should be stultified by manufacturers fearing to challenge the validity of a patent by boldly using the patented structure adversely to the interests of the patentee. *United States Gypsum Company* v. *Consolidated Expanded Metal Companies,* 130 F. (2d) 888 at p. 890. Further, this Court should erase the result of the

lower court's decision whereby no manufacturer will ever wish to take licenses under any patent in the Seventh Circuit because his right to assert invalidity for later discovered reasons or for any reasons may thereby be banished. See *Hawkinson Co.* v. *Dennis,* (5 Cir.) 166 F. (2d) 61, 62, and cases there cited. And see *Paramount Corp.* v. *Tri-Ergon Corp.,* 294 U. S. 464, 476.

2. Important questions not heretofore settled by decisions of this Court are raised.
   a. This Court to the best of the writer's knowledge, has never passed on whether the presumption of validity occasioned by issue attaches to a "freak" patent of the type here involved.
   b. This court has never passed on whether the presumption of validity occasioned by issue overcomes a finding of a trial court based upon convincing evidence that R. S. 4893 was not complied with and a patent application was improperly examined.
3. The court below has departed from the accepted course of judicial proceedings.
   a. The Court of Appeals in following its own decision in *Linde Air Products Co.* v. *Graver Tank & Mfg. Co.,* 167 F. (2d) 531, and ignoring this Court's reversal of the quoted point of the same case in *Graver et al.* v. *Linde etc.,* 336 U. S. 271, has thrown to the winds one of the basic reasons for the existence of this Court, and committed an error which must be rectified.
   b. The Court of Appeals has decided a side-issue and has neglected the principal question which arose in the case. It is the province of any court of equity to settle the controversy at hand, and not tangen-

tially to stray off on issues not germane. The issue in the case was whether or not the claims were valid. The respondents always asserted (Proposed Findings, R. 160-1) and the petitioner concurred, and the trial court found, that the claims attempted to cover the broad idea of a bracket visor clamped to a gutter, and not necessarily including a wedge. (R. 147 ff). Respondents' proposed finding 18 (R. 160) SETS FORTH THE RESPONDENTS' MOST LIMITED STATEMENT AS TO THE COVERAGE OF THE PECKAT CLAIMS, AND ABSOLUTELY NO INTENTION WAS EVER HAD TO LIMIT THE CLAIMS TO A WEDGING CONSTRUCTION. The Court of Appeals finding that the wedging clamp constitutes invention is of no consequence in this case. Petitioner could readily admit this is so,[4] without having ever left its original and constantly asserted position, and without fear of contradiction of any statements made or evidence adduced on behalf of its position. The Court of Appeals has thus ignored one of the Equity Maxims: Equity delights to do justice and that not by halves.

c. Petitioner's evidence, with the exception of one prior art patent (Fischer R. 259 offered R. 107) was all designed and directed towards the proof of anticipation of the respondents' concept of the invention, namely a visor bracket that clamped to a gutter. Since the claims measure the invention, petitioner was not required to adduce evidence for anticipating every detail shown in specification and drawings. The evidence went to the heart of the patent, the

[4] See footnote 1.

claims. The Court of Appeals admitted that the plain words of the claims broadly encompassed more than the specifically described construction. This admission was not based upon a file history and cited art, *because there were neither.* It must have been based upon the prior art and prior use evidence of the petitioner. The petitioner therefore resolved the TRUE ISSUE in its favor and proved what the respondents said could not be proven, and the Court of Appeals departed far afield from the accepted judicial procedure by finding the prior art insufficient, by holding the evidence clearly erroneous, and by reversing the findings of the trial court based upon petitioner's evidence. *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.,* 336 U. S. 271; 69 S. Ct. 535; Rule 52 (a) of F. R. C. P.

4. The decision adversely affects an important industry.

Irrespective of judicially conferred limitations buried in a lengthy and involved legal opinion, the Court of Appeals has bestowed validity upon claims whose broad language encompasses any visor bracket that clamps to an automobile gutter. No one in the industry, whether R. S. B. or others can know what the decision holds. Only more costly and vexatious litigation can result. The respondents have always taken the stand and still insist that they are entitled to the broad interpretation of the claims. The Court of Appeals has unwittingly played into their hands, and provided them with a deadly weapon for clubbing the visor industry to its knees. Immediately after the decision, publicity releases by respondents were made to national trade publications, and news articles purporting to give the facts appeared. (See appendix). These articles uniformly avoid the word "wedge" (the crucial ele-

ment) in any form, and brazenly emphasize the concept of "clamping to the gutters". Great confusion cannot help but result, and this Court should exercise its supervisory powers to dispel the fog, and rectify the errors made.

CONCLUSION.

This is not an ordinary case. The simplicity of the structure involved is inversely proportionate to the important effect thereof upon the patent law. Progress dictated by years of evolution in clarification of the great body of patent law should not, in one stroke, be wiped out, giving rise to a state of bewilderment. The need for claims which "particularly point out and distinctly claim" the invention as required by R. S. 4888 still exists.[5]

The writ should issue.

Respectfully submitted,

HENRY E. JACOBS,
By: HARRY ABRAHAMS,
Attorney for Petitioner.

I. IRVING SILVERMAN,
Of Counsel.
February 12, 1950.

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[5] See "Manual of Patent Examining Procedure", U. S. Pat. Off. 706.03(h) (1949).

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. .....

HENRY E. JACOBS, doing business as
HENRY E. JACOBS & CO.,
Petitioner,

vs.

CHARLES PECKAT MANUFACTURING COMPANY
and EMMA PECKAT,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The writ should issue:

If the decision of the Court of Appeals is permitted to stand unchallenged, no person skilled in a given art will ever be enabled to read a clear, concise, unambiguous claim and know whether he infringes or not,—what structures he can or cannot make without running afoul of the claims. If the decision remains unchallenged, R. S. 4888, the doctrine of *Halliburton* v. *Walker,* and indeed the necessity of having claims appended to a patent specification are totally scrapped. If the decision remains unchallenged, it will be almost impossible to overcome the presumption of validity of an issued patent. If the decision remains

unchallenged, the need for a Supreme Court is greatly reduced, if not eliminated insofar as forging the touchstone of our body of patent law.

OPINIONS BELOW.

The District Court filed no formal opinion. Its findings of fact and conclusions of law appear in the record at R. 147.

The opinion for the Court of Appeals for the Seventh Circuit is reported in ..... F. (2d) .....; 84 U.S.P.Q. 1. It appears in the record at R. 272.

JURISDICTION.

As pointed out in the petition, jurisdiction is invoked under section 1254(1) of the Judicial Code, 28 U.S.C.A. 1254.

STATEMENT OF FACTS.

The facts appearing in the petition are believed sufficient and complete.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding valid claims 1, 2, 6 and 7 of Peckat patent No. 2,180,909 and in reversing the judgment of the District Court with respect thereto.
2. In holding valid claims admittedly broad enough to encompass the prior art, by limiting same to the precise structure described in the patent specification and in reversing the judgment of the District Court with respect thereto.
3. In holding valid claims whose sole novelty purportedly rests in a wedging construction, where such construction is described in the claims by the phrase "A PAIR OF MEMBERS ADAPTED TO BE CLAMPED TO THE GUTTERS"; or by the phrase "APPARATUS OF THE CHARACTER DESCRIBED"; or by both phrases.
4. In holding valid claims 1, 2, 6, and 7, the first three of which have no language whatsoever describing the "crucial" wedging element, and the last of which describes same functionally contrary to R. S. 4888 (35 U.S.C.A. 33) and *Halliburton* v. *Walker,* 329 U. S. 1, and in reversing the judgment of the District Court with respect thereto.
5. In substituting for the extremely broad concept of the respondents as to the gist of the invention a new and limited concept never considered in the main issue, because the new concept might justify a finding of invention, whereas a finding that the broad concept of the patentee is invention would be untenable, and in rejecting the District Court's findings relative thereto.

6. In disregarding the Supreme Court's reversal of *Linde Air Products Co.* v. *Graver Tank & Mfg. Co.*, 167 F. (2d) 531, and applying the reasoning of that case to find the claims herein valid contrary to *Graver Tank etc.* v. *Linde Air etc.*, 336 U. S. 271, and in reversing the District Court whose findings followed the law of the latter case.

7. In according to a "freak" patent the presumption of validity by reason of issuance, and in reversing the finding of the District Court to the effect that the evidence showed that R. S. 4893 (35 U.S.C.A. 36) had not been complied with.

8. In holding clearly erroneous the findings of the District Court relative to prior art, prior use, prior invention, and in disregarding the nature of the actual models, testimony, depositions, and admissions of respondents' witnesses relative to the same.

9. In granting respondents a broad prior-art-encompassing monopoly measured by clear, simple, and unambiguous language in the claims of a patent by the expedient of writing into said claims purportedly prior-art-avoiding limitations where:

   a. The court admits the breadth of the language of the claims is prior-art-encompassing.

   b. The respondents consistently assert right to a monopoly measured by the broad interpretation of the claims.

   c. The claims have no words justifying the limitations.

   d. The issue of the case—the validity of the claims as broadly interpreted—was never decided by the Court of Appeals.

   e. Great confusion has been engendered in an important industry.

10. In refusing to hold:

    a. The claims in suit invalid as anticipated.

    b. The claims in suit invalid as failing to comply with R. S. 4888.

ARGUMENT.

This Court should grant the writ prayed for because:

1.. Important questions of patent law have been decided contrary to this Court's decisions and those of other circuits.

a. The Court of Appeals read limitations derived from the specification into claims too clear, certain, and unambiguous to enable such practice, and too broad otherwise to be valid.

Since the petitioner admitted infringement in its answer to the complaint (R. 5) the only question involved in the case was the validity of the claims. The Peckat construction, as pointed out in the petition, included a wedging member which operated in connection with a clamp to clamp the Peckat brackets to automobile gutters and then tighten them by forcing the wedge into engagement with the gutter and a flange of the bracket.

The claims, however, were clearly worded to cover any visor bracket so long as it could be clamped to a gutter. Throughout the litigation, the respondents, as will be shown hereinafter, insisted that the patent's coverage was so broad, and issue was joined on that basis. The petitioner's proof was practically all directed to show that claims for so broad a construction were invalid. How well the petitioner succeeded is attested to by the decision of the District Court, and by the recognition of the prior art by the Court of Appeals. True, the Court of Appeals in words finds the prior art and prior use evidence insufficient, but note that the court says: (R. 278)

> "So here where the claims expressly limit the claimed invention to the device specified and described explicitly, with definite limitations, we find nothing to in-

validate the claims BECAUSE THEIR LANGUAGE, IF *NOT* SO LIMITED WOULD COVER TOO BROAD A FIELD." (Emphasis supplied).

What "field" is the court discussing? It must be the great body of prior art evidence introduced by petitioner, because THERE IS NO SHRED OF PRIOR ART IN THE FILE WRAPPER OF THE PECKAT PATENT (R-126). Why, if the prior art and related evidence were so insignificant, was there need to limit the claims to include in every instance the "wedge"? Only because the evidence was so strong that in effect the Court of Appeals had to respect it.

Now, will the claims support any such limitations as imposed by the Court of Appeals and lifted from the specifications and description? The court said of the specification and description "first, they serve to explain and define a claim wherein they are incorporated by reference and, second, they frequently limit the invention of the claim to the device described." (R. 277) Let us analyze a typical claim, keeping in mind that unless the limitation is justified, the claim admittedly is invalid.

Claim 1 is typical and consists of three distinct phrases:

The introduction

Apparatus of the character described for supporting an awning in the desired position with respect to the windshield of an automobile having gutters adjacent the windshield, including:

The clamp

a pair of members adapted to be clamped to the gutters on each side of the windshield;

The awning connection

and means carried by the members for supporting the awning in said position.

This claim admittedly reads on the prior art, but is brought to life by the Court of Appeals relating it back to the specification and drawings. How is this done? Is it the "clamp" phrase? Obviously not, because the prior art is replete with clamps of every kind (see Def. Ex. Q. 28 offered R. 107). Is it the "connection" phrase? No, because there is nothing of importance there. It must be in the "introduction" phrase, and the relating words "of the character described" must give to the claim everything contained in the Court of Appeals conception as to the crux of the invention: "clamping onto the gutter without holes, welding, or riveting and tightening and making firm the clamp by the essential wedging element." (R. 280)

There is not a single uncertain word in the entire claim. Obviously the introduction sets the stage, and the invention is supposed to be the clamp. This Court has never sanctioned relating a claim back to the specification to *supply* invention. Every case cited by the Court of Appeals in which this was done, had at least some vestige of the invention in terms in the claim. ***The Peckat claims have nothing.*** The invention, the Court of Appeals says (R. 282) lies in:

"clamping * * * and wedging."

The "clamp" phrase takes care of the "clamping" but WHAT ABOUT THE "WEDGING"?

The claims were clearly limited for *finding* the invention, not explaining it, and are invalid. *McCarty* v. *Lehigh Valley,* 160 U. S. 110, and cases cited in petition.

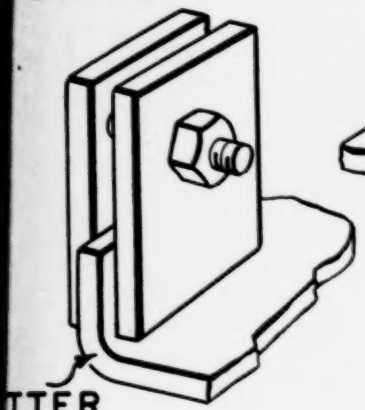
b. The Court of Appeals defined the "crucial" element as the wedging construction, but held valid claims which in absolutely no manner described a wedging construction, contrary to R. S. 4888 and *Halliburton* v. *Walker.*

The sketch on the facing page so clearly illustrates this

IS THE "INVENTION" DESCRIBED IN THE CLAIMS AS REQUIRED BY R. S. 4888 ?

GIST OF INVENTION

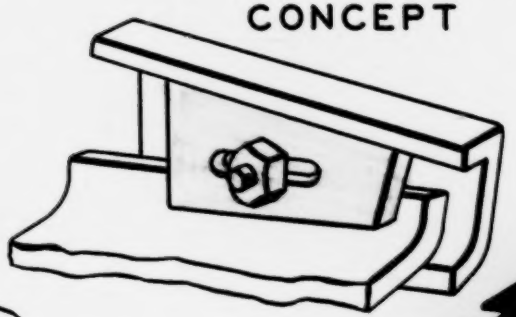
PECKAT'S BROAD CONCEPT



TTER

CLAMP ONLY

COURT OF APPEALS' CONCEPT



CLAMP WITH WEDGE (CRUCIAL ELEMENT)

YES!

NO!

CLAIM 1

APPARATUS OF THE CHARACTER DESCRIBED FOR SUPPORTING AN AWNING IN THE DESIRED POSITION WITH RESPECT TO THE WINDSHIELD OF AN AUTOMOBILE HAVING GUTTERS ADJACENT SAID WINDSHIELD, INCLUDING:

A PAIR OF MEMBERS ADAPTED TO BE CLAMPED TO THE GUTTERS ON EACH SIDE OF THE WINDSHIELD; AND MEANS CARRIED BY THE MEMBERS FOR SUPPORTING THE AWNING IN SAID POSITION.

COPY PRINTER CLOSE TO EDGE

point that there is little need to say much more. It is desired to point out however that the cases cited in the petition are those where there was some functional language. Here, however, Peckat has no language whatever to point out the "crucial element" and thus this case is much stronger than *Halliburton* v. *Walker,* 329 U. S. 1. The patentee here was so intent on claiming any possible variation of a bracket clamped to a gutter that the claims are directed merely to a result. This case is also distinguished over *Faulkner* v. *Gibbs,* ..... U. S. ....., 83 U.S.P.Q. 192. Here the Court of Appeals leaves no doubt that it considers the novelty as resting in the wedging construction, described by the Court as "the crucial element" (R. 279), and "the essential wedging element" (R. 279). The novelty in the *Faulkner* case rested in the combination.

c. The Court of Appeals depended strongly upon presumption of validity.

As pointed out in the petition, this case does not stand on all fours with those cited as a basis for presuming validity because of issuance. Here there are so many extenuating circumstances, that it cannot be seen how the presumption can stand, especially after a contrariwise finding by the District Court. The cases cited in the petition point in the opposite direction.*

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* In **Frank Adams Electric Co.** v. **Colt's Patent Fire Arms Mfg. Co.,** 148 F. (2d) 497, 502, the Court of Appeals for the Eighth Circuit said:

> "We think that the Supreme Court, in its more recent decisions in patent cases, has indicated that presumptions based upon the issuance of patents or upon the mere fact that a patented device differs from the prior art disclosures in structure or design, may not be used to transmute the products of mechanical skill into patentable inventions."

2. Important questions not heretofore settled by decisions of this Court have been raised.

a. This Court to the best of the writer's knowledge, has never passed on whether the presumption of validity occasioned by issue attaches to a "freak" patent of the type here involved.

The question is covered in the petition.

b. This Court has never passed on whether the presumption of validity occasioned by issue overcomes a finding of a trial court that R. S. 4893 was not complied with.

The Court of Appeals states (R-285) "There is no direct evidence of any dereliction upon the part of the patent office." There is no reason why direct evidence need be adduced. The evidence found by the trial court was sufficient for the court to conclude that R. S. 4888 had not been complied with. Such findings obviously render the patent invalid. If such claims as here in suit are so flagrantly violative of R. S. 4888, it follows that R. S. 4893 was also violated because there was not a proper examination. The additional evidence relating to obvious derelictions in examination of the application (R. 153) found by the District Court fortify the inference and justify the conclusion.

Surely there is no reason why the presumption of validity occasioned by issuance should be so sacred as to black out the logic of the District Court's findings. The infallibility of administrative bodies is not presumed in a democracy. It is not inconceivable that the patent office errs from time to time.[7]

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[7]The attention of the Court is invited to a criticism of the Patent Office by William H. Davis, Chairman of the Department of Commerce Patent Committee and of the Patent Ad-

3. The Court below has departed from the accepted course of judicial proceedings.

a. The Court of Appeals did not follow *Graver Tank, etc.* v. *Linde Air Prod. Co.*, 336 U. S. 271, but instead followed *Linde Air Prod. Co.* v. *Graver Tank, etc.*, 167 F. (2d) 531, although the former case reversed the latter.

The Court of Appeals says (R. 278):

"And, in *Linde Air Products Co.* v. *Graver Tank & Mfg. Co.*, 167 F. (2d) 531, 536 we said 'Furthermore these claims now under consideration seem to be sufficiently definite when construed in the light of the specification. The statute merely states that the claims should particularly point out and distinctly claim the part, improvement, or combination which the applicant claims is his invention or discovery. 35 U.S.C.A. 33. It would seem that this statute only requires that the claims point out the invention, not that they re-describe it.''

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visory Panel of the Atomic Energy Commission, in an article "Proposed Modifications in the Patent System," Vol. XII (1947), **Law and Contemporary Problems** (Duke University), No. 4 at page 801 in which he states:

"* * * a basic deficiency in the operation of the Patent Office, which is all the more deplorable because if it were remedied the Patent Office could do a service to American industry of really tremendous value, is that the Office grants too many invalid patents. The two main functions of the Patent Office are to serve as (1) a publicly accessible general repository of industrial technology, and (2) an effective check upon the granting of improper patents. These two things go together. The Examiners cannot serve as an effective check upon the granting of improper patents unless they are equipped with an up-to-date and easily accessible record of the state of applied science and useful arts. In this respect the Patent Office is markedly deficient."

In its conception of the requirements of R. S. 4888, the Court of Appeals found claims 1, 3, 4, 7, 8, and 9 of the patent in the *Linde* v. *Graver* suit valid, but this Court reversed, holding the claims invalid under the statute, as originally found by the District Court in that case.

Notwithstanding this reversal by the Supreme Court, the Court of Appeals for the Seventh Circuit applied the statute in the manner forbidden by the Supreme Court, and here as in the *Linde* v. *Graver* case, reversed the District Court to hold the Peckat claims valid, and *cites from its reversed decision as authority to do so.* Clearly this is a most grievous and erroneous misapplication of the law and a departure from the accepted and usual course of judicial proceedings, and calls most certainly for this Court to exercise its powers of supervision. It defeats one of the prime purposes for the existence of this court: the review and supervision of Courts of Appeals and the resolution of important questions of law for the guidance thereof.

b. The Court of Appeals did not render a judgment on the main issue involved, but raised an unimportant side issue which might have justified a reversal, tacitly recognizing that the only judgment which it could have rendered upon the true issue would have required affirmance.

Neither the petitioner, nor the respondent, nor the trial court ever conceived that the issue here was limited to the validity of a patent claiming a wedging clamp. That theory is newly advanced by the Court of Appeals, and wholly unwarranted by anything in the record and comes as a complete surprise. Petitioner still could presume that the wedging construction is invention without changing the main issue in the case, ignored by the Court of

Appeals. The respondent has ever and continuously contended in argument, and throughout briefs in the District Court and in the Court of Appeals that the novelty lies in the simple idea of clamping a visor to the gutters of an automobile, IRRESPECTIVE OF THE QUESTION OF WEDGING, and the claims are so drawn. The keynote of the case was sounded by the respondent in the opening statement of the trial (R. 18):

> "The patent application was the first to show *the gutter clamp-on bracket* for a sun shade and as his (Peckat's) claims were all limited to that feature, the application was allowed on the first action. The Patent Office did not cite a single patent or cite a *clamp-on bracket* for a sun shade; and defendant's answer fails to show any art at all that has *the feature we say is the gist of the invention.*" (Emphasis ours.)

The respondents contend and have always contended that the gist of the invention is the bare idea of clamping brackets to gutters as simply stated in the claims, and that the wedging construction is a refinement. This contention has continued since the decision of the Court of Appeals as amply demonstrated by the news articles released by respondents to the principal national trade periodicals (see appendix).

The Court of Appeals has not rendered a decision upon the principal issue, namely whether claims embracing the clamping members, are valid. It has awarded the laurels of victory to the respondents and thereby sanctioned the respondents' position that THE WEDGE IS A MINOR PART OF THE PECKAT INVENTION, THE BROAD CLAMPING IDEA BEING THE GIST THEREOF.

This procedure of avoiding the issue is most unusual. However, it had to be followed, because it was the only

straw of validity to which a reversal might cling. The Court of Appeals would otherwise have to find the claims broad enough to encompass the prior art and hence invalid.

The Court of Appeals, by ignoring the principal issue and rendering no judgment thereon, has violated one of the principle Equity Maxims: "EQUITY DELIGHTS TO DO JUSTICE, AND THAT NOT BY HALVES." It is not believed necessary to cite cases to demonstrate that the rights of the parties, their respective positions, and the questions raised in a controversy must be fully adjudicated by a court of equity. "The maxim that equity delights to do justice, and that not by halves means that it is the aim of equity to have all interested parties in the court and to render a complete decree adjudicating all rights and protecting the parties against future litigation." 30 Corpus Juris Secundum 506.

c. Practically all evidence proved that claims reading only upon clamping brackets were invalid, but the Court of Appeals found the evidence insufficient when applied to the inconsequential issue upon which the Court erroneously based its decision.

In any litigation, before either party presents proof, an issue must be reached. The very spirit of the F.R.C.P. is based upon the great benefits to be derived from a clear-cut issue. Then, each side brings evidence to sustain its version of the manner in which the issue should be resolved. This logical procedure makes for speedy, clear-cut, and economical trials with satisfactory results. But it is impossible for a litigant to bring proof for every possible issue that the court can evolve from the case and it is impossible for that party to anticipate which of the said possible issues the court is going to seize upon for basing its decision.

It has been pointed out that the principal issue here was whether the claims, broadly encompassing any bracket which clamps to a gutter without holes, could be valid in view of the prior art, and R. S. 4888. This has been and is still the position of the respondents. This was the understanding of the District Court. This was the understanding of the petitioner. This is the issue to which the evidence of the petitioner was pointed. This is the only issue which the claims as drawn permit of. And this issue was answered in the negative by the District Court based upon petitioner's evidence. Likewise, when the Court of Appeals stated that the language of the claims if not limited by the specification "might import a wider field," (R. 275) and again "we find nothing to invalidate the claims because their language, if not so limited, would cover too broad a field," (R. 278), it agreed with this proposition. The Court said (R. 282) "* * * let us examine the claims * * *." BUT THE COURT NEVER DID, BECAUSE SUCH EXAMINATION WOULD REVEAL THEIR UTTER INVALIDITY.

So—with the Court of Appeals having recognized that petitioner's evidence *was* good enough to force a finding that the claims read on the prior art, the findings of fact of the District Court based upon this evidence were not clearly erroneous, and like the findings in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, they should not have been upset.

4. The decision adversely affects an important industry.

This Court's attention is invited to the clippings from national trade periodicals which are in the appendix and which indicate that this decision has a far-reaching effect upon the important visor industry. Although the language of the decision for the most part seems to specify

that the claims of the Peckat patent are limited to a wedging clamp, NOT A SINGLE WORD ABOUT WEDGING OCCURS IN ANY OF THESE TRADE PAPER NEWS ITEMS. Although we cannot hold respondents responsible for statements attributed to them in news articles, nevertheless it is more than coincidental that although the Court of Appeals in its opinion mentioned the word "wedge" in one form or another no less than *eighteen* times not a single reference is made to the "wedge" in the news articles. The effect created is that the ordinary person believes the Peckat patent is broadly inclusive of ANY VISOR BRACKETS THAT CLAMP TO THE AUTOMOBILE GUTTERS. And such ordinary person is justified in so believing:

1. Claims 1, 2, and 6 mention nothing about wedges.
2. The Court of Appeals said (R. 283) "It is clear that he (Peckat) was the first to conceive of a visor supported by brackets attached solely to the gutters without bolting."
3. To one investigating the Peckat patent, it is logical to reason that since there is a claim that mentions the wedging principle, namely claim 7, the three that do not, namely, claims 1, 2, and 6 ARE NOT LIMITED THEREBY.
4. The patent law never required of one who wishes to know the metes and bounds of a short, uncomplicated claim, purporting to cover a simple structure, and in everyday, ordinary language would be forced to guess correctly the interpretation of a court decision in order to determine what he can or cannot do in view of the patent.

The Court of Appeals has thus precipitated a complete and utter state of confusion in the industry. To the visor industry, respondents are justified in asserting that the invention is coextensive with the claims, and that any visor made by R.S.B. or any other manufacturer which clamps to the automobile gutter, whether by the use of wedges or no, infringes the Peckat patent. This can result in either more protracted litigation or the use by respondents of this decision and the Peckat patent as a bludgeon in exacting tribute from the visor industry.

This is most assuredly a case in which this Court's review is required once and for all to settle an unsettled controversy, to resolve a state of confusion in an important industry, and to foreclose vexatious, expensive, and protracted future litigation.

CONCLUSION.

In view of the important principles of patent law affected by the decision of the Court of Appeals, it is believed that the Supreme Court should exercise its powers of review in this case.

Respectfully submitted,

HARRY ABRAHAMS,
Attorney for the Petitioner.

I. IRVING SILVERMAN,
Of Counsel.
Feb. 12, 1950.

GASOLINE NEWS
Thursday, January 5, 1950

VISOR PATENT DECISION UPHOLDS PECKAT CLAIM

Chicago, Ill.—In a recent decision the U. S. Federal Court of Appeals, 7th District, upheld the claim of the Charles Peckat Mfg. Co. of Maywood, Ill. to the exterior auto visor patent held by that firm.

W. A. Mueller, president of the Peckat company hailed the decision as one of "far-reaching importance to the automotive jobber and car dealer."

The suit, involving patent No. 2,180,909 covering mounting an exterior auto visor to the rain gutter of an automobile, was won on every point by Peckat, thus affirming that company's exclusive claim to a "clamp-on" method of attachment.

AUTOMOTIVE NEWS, JANUARY 2, 1950

PECKAT CLAIMS PATENT VICTORY

Chicago.—W. A. Mueller, president of Charles Peckat Mfg. Co., announced here last week that a decision by the U. S. Federal Court of Appeals, seventh district, had upheld a patent claim by the Peckat company covering the mounting of an exterior auto visor to the rain gutter of a car.

Mueller said the ruling affirms his company's exclusive claim to this method of attachment, and cautioned that the Peckat company and its licensees are the only firms legally permitted to manufacture and distribute a "clamp-on" shade of the character covered by the patent in dispute, patent 2,180,909.

AUTOMOTIVE RETAILER
January, 1950

PECKAT CO. WINS IN VISOR CLAMP CASE

Chicago.—A patent covering the mounting of an exterior visor on an automobile rain gutter was affirmed by the U. S. Federal Court of Appeals, 7th District, last month. In the case of Charles Peckat Manufacturing Co. versus Henry E. Jacobs, Patent No. 2,180,909 was upheld in favor of Peckat.

According to an announcement from the Peckat company, every point involved in the suit was won by them, affirming their exclusive claim to this method of attachment. The decision is said to establish the fact that the Charles Peckat Manufacturing Co., of Maywood, Ill., and its licensees are now the only firms legally permitted to manufacture and distribute a "clamp-on" shade of the character covered by this patent.